leading up to this amendment, Walgreens opened 12 pharmacies in Puerto Rico. Pet. App. 28. Although this represented a tiny proportion of the approximately 850 retail pharmacies in Puerto Rico in 1979, it was a threat of more competition from national chains to come.[1] Significantly, all of these pre-existing pharmacies were protected by a provision that entitled them to a CNC "without the requirement of the determination of public necessity and convenience and without the holding of a hearing." § 334g.

Although this group of overwhelmingly local pharmacies did not themselves have to demonstrate that their facilities were necessary or convenient, they were given the right to object to any prospective competitor that sought to open a pharmacy within their so-called "service area," defined in the implementing regulations as a one-mile radius. The CNC Act requires that such local pharmacies be notified of any CNC application in their area, and entitles them to submit evidence in opposition and challenge in the courts any CNC that does issue. The record below demonstrated that local pharmacies frequently took advantage of these procedures.

The opposition of local pharmacies to CNC applications plays a major role in the operation of the CNC Act. The opposition of a local pharmacy always delays, and often

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1. The *Asociacion de Farmacias de la Comunidad*, a trade association of pharmacies in Puerto Rico that limits membership to pharmacies in which the majority shareholders are residents of Puerto Rico, unsuccessfully sought to intervene in this case to defend the constitutionality of the CNC Act. The *Asociacion* has consistently advocated for the inclusion of pharmacies in the CNC Act, despite the considerable administrative burdens that the Act imposes on its members. Pet. App. 28-29. That in itself is powerful evidence that the CNC Act is protectionist, as this Court has observed. *See Hunt v. Wash. Apple Adver. Comm'n.*, 432 U.S. 333, 352 (1977).

prevents, national retailers from opening a competing pharmacy. Moreover, the uncontroverted statistical evidence adduced at trial clearly suggests the existence of a double standard in the application of the CNC Act. Local pharmacies seeking CNCs are almost invariably successful, receiving CNCs 97% of the time, including a 90% success rate even when there is opposition from other pharmacies. However, when there is opposition to a national retailer's CNC application, the application is denied almost as often as it is allowed.

Proceedings Below

Contrary to petitioner's suggestion, Pet. 6, the case was not decided on cross-motions for summary judgment. Rather, the parties consented to a trial by the district court on a stipulated written record that consisted largely of undisputed statistical evidence concerning the application of the CNC Act and expert testimony. *See* Pet. App. 7 n.2. The district court and the court of appeals accepted the uncontested evidence that "local pharmacies are granted a CNC at a much higher rate than their out-of-state counterparts." Pet. App. 45.

The district court concluded that the statistical evidence alone was an insufficient basis to conclude that the CNC Act discriminated against non-local applicants. However, the court of appeals ruled that the statistical evidence, combined with (i) the exemption of a large group of almost entirely local pharmacies from the requirements of the CNC Act, (ii) the consistent practice of enforcing the Act only if an existing pharmacy opposes a CNC application, and (iii) the Act's direction that the Secretary of Health deny a CNC if the new pharmacy would "unduly affect" existing pharmacies in the area, compelled the conclusion that the Act discriminated against interstate commerce. Pet. App. 10-11.

The First Circuit then considered whether petitioner had justified the discrimination "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." Pet. App. 18 (quoting *Hunt v. Wash. Apple Adver. Comm.*, 432 U.S. 333, 353 (1977)). Petitioner had made no attempt to justify its implementation of the CNC Act's pharmacy provisions with reference to the cost saving rationale of the federal CON legislation. The experts below all acknowledged that limiting competition, as the CNC Act does, reduces pressure to moderate the prices charged for prescription drugs. The only justification that petitioner advanced was that by denying CNCs in areas already served by pharmacies, the government would encourage the establishment of pharmacies in "underserved" regions. However, the court of appeals noted that the experts on both sides agreed that the Act cannot reasonably be thought to advance that interest. Pet. App. 18. Denying a CNC applicant the ability to establish a pharmacy in a profitable location does nothing to make a different, unprofitable location more attractive.

REASONS FOR DENYING THE PETITION

Petitioner does not contend that the decision below conflicts with any decision of this Court or of any other federal or state appellate court. To the contrary, there have been many decisions over the years that have struck down state laws that impose disproportionate barriers to market entry on non-local businesses. *See, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 545 (1948); *Buck v. Kuykendall*, 267 U.S. 307, 314-16 (1925); *McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 441-44 (6th Cir. 2000). Petitioner does not identify a single decision of any court that is inconsistent with the First Circuit's decision below.

Petitioner does suggest that the questions presented are "important question[s] of federal law that ha[ve] not been, but should be, settled by" this Court. Sup. Ct. R. 10(c). However, neither of the questions set forth in the petition satisfies this criterion.

I. The Question Concerning the Effect of the Long-Repealed National Health Planning and Resources Development Act of 1974 on Discriminatory Certificate of Need Laws was Not Raised Below and Presents No Important Issue that Requires Resolution by this Court.

Petitioner's first question, to which she devotes the bulk of the petition, is whether the National Health Planning and Resources Development Act of 1974 (the "1974 Act") "insulates" the CNC Act from commerce clause scrutiny. Petitioner argues that by imposing the obligation on States to adopt CON legislation, Congress permitted the States to act in a manner that would otherwise violate the commerce clause. *See* Pet. 10.

At the outset, review of this question is unwarranted because petitioner has raised it for the first time in her petition. She made no such argument in either the district court or the court of appeals. As a result, petitioner has waived any right to press it. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 104-105 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) ("Only in exceptional cases will this Court review a question not raised in the court below.").

Moreover, even if petitioner could raise this issue, review is in no way warranted under the standards followed by this Court.

Petitioner's first question has two parts. The first is whether the 1974 Act did in fact authorize Puerto Rico to discriminate in favor of local pharmacies in the CNC Act. The legal standard that governs this question is not a matter of controversy. This Court has made it clear that since the commerce clause is a grant of regulatory and legislative power to Congress, Congress can permit States to regulate commerce in a manner that would not otherwise be permitted. It is equally well-settled that courts will not lightly infer such authorization, but will require that Congress set forth its intent to do so in a manner that is "unmistakably clear." *South-Central Timber*, 467 U.S. at 91. Petitioner acknowledges this principle. Pet. 10.

However, one searches the petition in vain for the identification of any language in the 1974 Act or its legislative history that expresses *any* intent to permit discrimination against interstate commerce in the implementation of CON statutes, much less anything that rises to the level of unmistakable clarity. Petitioner is content simply to say that Congress "required" CON laws. Pet. 11.

Petitioner begs the question. There is nothing in the 1974 Act or its legislative history that even remotely supports the notion that the CON requirement — a device intended to reduce the costs of health care nationally — could be used to protect local health care providers, much less pharmacies, from competition from out-of-state businesses.

The statute's only possible reference to pharmacies — which the Secretary notes only in passing, Pet. at 11 n.6 — is that the definition of a "provider of healthcare" includes persons who "produc[e] or suppl[y] drugs . . . for individuals" or an entity that "produc[es] drugs." 1974 Act § 1531(3)(B)(II). Even if this definition were read to refer to pharmacists, it plainly does not constitute the unmistakably clear support for the

discrimination practiced by the CNC Act. This definition was included for a quite different purpose: to limit the influence of "providers of healthcare" in the regulatory process.

The 1974 Act was to be administered, in large measure, by a series of councils — federal, § 1503, regional, § 1511, and state, § 1524 — that would review CON applications and distribute funds. *See, e.g.*, § 1512(B)(3)(B) (listing powers of regional councils). The membership of each council was carefully balanced among representatives of various interest groups. For example, of the twelve voting members of the federal council, not more than three could be federal employees; no fewer than three could be members of state councils; and Democrats and Republicans had to be equally balanced. § 1503(B)(1). The statute also sought to prevent providers of health care from dominating the councils by ensuring that "persons who are not providers of health services" were guaranteed five seats.[2] *Id.*

The legislative history confirms that the purpose for defining "providers of healthcare" was to delineate the composition of the various regulatory councils. As the Senate Report explained:

> The intent of the definition of "providers of health services" contained in the proposed legislation is to include any individual with an existing or potential conflict of interest with respect to the recommendations of the health planning agency. Although the committee recognizes the valuable contributions providers of health services can and

2. A similar limitation on industry representation is required at the regional, § 1512(B)(3)(C)(I) ("a majority" of seats must be held by "consumers of health care . . . who are not . . . providers of health care") and state, § 1524(B)(1)(A)(III) (same), levels, too.

> must make to the health planning process, it also believes that if the plan which emerges is to be viable, their influence on the health planning process must be appropriately limited.

S. Rep. No. 93-1285, at 7885 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7842.

There is absolutely nothing in the 1974 Act or its legislative history that suggests that Congress contemplated that the States would require pharmacies to obtain CONs. Since pharmacies are in no position artificially to increase demand for the products they sell, the market imperfections that prompted Congress to enact CON legislation do not exist in the retail pharmacy market. As a result, no State has ever required pharmacies to obtain CONs. *A fortiori*, there is nothing in the statute that could plausibly be read to permit States to favor local pharmacies in processing CON applications. Since there is no indication *at all* that Congress endorsed such discrimination, petitioner cannot possibly demonstrate such intent with unmistakable clarity.

This Court has refused to find Congressional approval of protectionist State legislation under far more compelling circumstances than those presented here. In *South-Central Timber*, for example, the State of Alaska prohibited the export of unprocessed logs taken from lands owned by the State, but required, as a condition of export, that the logger process the timber in Alaska. A logging company challenged the regulation as a violation of the commerce clause. The State defended by observing that the federal government imposed a similar policy on timber taken from federal land, including federal land in Alaska. The State argued that this reflected Congress' approval of local processing requirements.

This Court rejected the argument, finding that the approval of a "parallel policy" did not constitute a clear and unmistakable approval of any State pursuing the same policy. If there were no "unmistakably clear" authorization for State action that violated commerce clause principles in *South-Central Timber*, then *a fortiori* there is no such authorization in this case, where there is neither express authorization for the violation in the 1974 Act, nor supportive language in its legislative history, nor any "parallel" federal policy. *See also C&A Carbone, Inc.*, 511 at 409 (O'Connor, J., concurring) (in spite of references in statute and legislative history "indicat[ing] that Congress expected local governments to implement some form of flow control," these "neither individually nor cumulatively r[o]se to the level of the 'explicit' authorization required by [the Court's] dormant Commerce Clause decisions.").

But even if there were something in the 1974 Act that lent colorable support to petitioner's claim that Congress blessed its protectionism, Congress repealed the 1974 Act nearly twenty years ago. If the 1974 Act shielded Puerto Rico from a commerce clause challenge to the CNC Act, then Congress removed the shield long before Walgreens commenced this litigation.

Petitioner posits that since Congress did not specifically address "what would happen with state CON laws" when it repealed the 1974 Act, "the only reasonable way to interpret what Congress intended is to conclude that it did not wish to change its earlier authorization of such laws." Pet. 12. This is nonsense. A repeal is a repeal. The only reasonable inference is that Congress intended to eliminate whatever effect Congress sought to achieve when it enacted the 1974 Act. Had it wished to preserve some requirement or

protection enacted as part of the 1974 Act, Congress would not have repealed the pertinent portion of the Act.

Petitioner also suggests that the First Circuit's decision calls into question the validity of CON legislation throughout the country. But the court of appeals did nothing of the sort. Both Walgreens' challenge and the First Circuit's ruling were expressly limited to the application of the CNC Act to retail pharmacies. The court's holding in this regard is unambiguous: "For the foregoing reasons, [the CNC Act] *as enforced by the Secretary of Health for the issuing of certificates of necessity and convenience to retail pharmacies*, is invalid under the dormant Commerce Clause." Pet. App. 19 (emphasis added). Nothing in the decision below precludes Puerto Rico (or any State) from continuing to apply the CNC Act to hospitals, nursing homes, diagnostic and treatment centers, blood banks, and the other "health facilities" identified in the Act.

Because the ruling was limited to retail pharmacies, it will have *no* effect on the CON laws of any State. Puerto Rico is the only U.S. jurisdiction that applies its CON legislation to pharmacies.

Petitioner argues in a footnote that "[t]he reasoning used by the Court of Appeals for invalidating the CNC Act is equally applicable to *all* CON programs nationwide, regardless of the type of health facility that they regulate." Pet. 11 n.6. Petitioner reads more into the First Circuit's decision than it will bear.

The First Circuit plainly did not rule that the principles that underlie CON legislation in general to be in any way inconsistent with the commerce clause. The "market imperfection" rationale for CON legislation does not apply to the retail pharmacy market. No other CON law applies to pharmacies. The court of appeals merely ruled that Puerto Rico could not regulate pharmacies in a way that served primarily to

protect local pharmacies from competition from national retail chains. There is absolutely nothing in the record in this case to suggest that any other jurisdiction uses its CON legislation in such a protectionist fashion, or that Puerto Rico applies the CNC Act in a protectionist fashion with respect to any other kind of facility. In the absence of evidence of such abuse of the CON process, the First Circuit's decision in this case will afford no help to those who seek to invalidate CON laws.

II. Petitioner's Second Question Merely Challenges the Inferences that the Court Drew from the Record and Does Not Present a Question that Warrants Review by this Court.

Petitioner's second question presents no unsettled question of law. Petitioner does not contend that the First Circuit applied incorrect legal principles. Her contention is that in applying those principles to the largely undisputed evidence in the record, the First Circuit reached the wrong conclusion. Petitioner's contention in this regard is incorrect, but even if she were right, her second issue does not warrant review by this Court.

Petitioner's principal argument appears to be that the First Circuit placed undue emphasis on the facts that the CNC Act insulated the more than 800 pharmacies already established in Puerto Rico when the Act was passed from being required to prove that their pharmacies were necessary and convenient, and that all but a dozen of these pharmacies were locally-owned. This argument is deeply flawed.

This Court has recognized that a statute's exemptions and exceptions bear on the commerce clause analysis. For example, in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), this Court invalidated on commerce clause

grounds a state law that restricted the length and configuration of trucks that could be operated within the state. The Court observed:

> One other consideration, although not decisive, lends force to our conclusion that the challenged regulations cannot stand. As we have noted, Wisconsin's regulatory scheme contains a great number of exceptions to the general rule that vehicles over 55 feet long cannot be operated on highways within the State. At least one of these exceptions discriminates on its face in favor of Wisconsin industries and against the industries of other States, and there are indications in the record that a number of the other exceptions, although neutral on their face, were enacted at the instance of, and primarily benefit, important Wisconsin industries. Viewed realistically, these exceptions may be the product of compromise between forces within the State that seek to retain the State's general truck-length limit, and industries within the State that complain that the general limit is unduly burdensome. Exemptions of this kind, however, weaken the presumption in favor of the validity of the general limit, because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce.

Id. at 446-47 (footnote omitted). The First Circuit considered the evidence of the CNC Act's exemption of pre-existing pharmacies in exactly the same manner as this Court considered the exemptions in *Raymond*, that is, as weakening the petitioner's argument that the statute was neutral. The

inference was particularly strong in this case because the Act not only exempted a huge number of overwhelmingly local pharmacies from the Act's operation, but also directed the Secretary to deny CNCs when a proposed new pharmacy would "unduly affect" them.

Petitioner posits that "[t]his Court has consistently validated the inclusion of grandfather clauses within the regulatory schemes for the issuance of certificates of necessity and convenience." Pet. 22. However, the only support advanced for this proposition are two cases involving grandfather clauses in *federal* regulatory schemes.[3] Obviously, limitations on *state* power imposed by virtue of this Court's dormant commerce clause jurisprudence have no effect on the actions of the federal government.

The First Circuit did not rule that "grandfather clauses" are *per se* invalid or in themselves establish a violation of the commerce clause. The court merely gave weight to the fact that local pharmacies were exempted in large numbers from burdens imposed on newcomers just as national retail chains were beginning to enter what had been an entirely local industry. In light of the other evidence — the stark statistical disparity in success rates enjoyed by local pharmacies as opposed to national chains in the CNC process, the vehement support of local pharmacies for the CNC Act, and the provision of the Act that directed petitioner to insulate existing pharmacies from unwanted competition — the First Circuit's conclusion was entirely logical and defensible. In any event, there is no reason to think that this unusual combination of factual circumstances is likely to be repeated.

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3. *Crescent Express Lines v. United States*, 49 F. Supp. 92 (S.D.N.Y. 1943), *aff'd*, 320 U.S. 401 (federal Motor Carrier Act); *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942) (same).

It is not a wise use of this Court's very limited time to review a case to decide whether there was sufficient evidence to sustain a conclusion based on the application of settled and undisputed legal principles. That is all that petitioner's second issue invites this Court to undertake.

CONCLUSION

The petition in this case asks this Court to review (i) an issue never raised below that is unlikely ever to arise in any other case, and (ii) the sufficiency of the evidence to sustain the conclusion reached by the court below based on unchallenged and well-established principles of law. Neither question presented warrants this Court's attention. The petition should be denied.

Respectfully submitted,

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No. 05-585

IN THE

Supreme Court of the United States

ROSA PÉREZ-PERDOMO, in her official capacity as Secretary of Health of the Commonwealth of Puerto Rico,
Petitioner,

v.

WALGREEN CO.; WALGREEN OF SAN PATRICIO; and WALGREEN OF PUERTO RICO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

This case does present important issues of law as to which there is substantial dispute, and which call for review by this Honorable Court. Indeed, perhaps the best evidence that the first question presented is hotly disputed is furnished by Respondents' own brief, a considerable portion of which is dedicated to arguing that the repeal of the National Health Planning and Resource Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (repealed 1986) (the "1974 Act"), divested the States of any protection they would otherwise have had from challenges pursuant to the Commerce Clause. That Respondents so strongly disagree with Petitioners on this point should tip the balance in favor of the grant of the petition for a writ of certiorari.

As a procedural matter, this Court is clearly permitted to review the first question presented; namely, whether the 1974 Act shields the CNC Act from Commerce Clause scrutiny.[1] Although Respondents are correct in noting that Petitioner did not fully develop this argument below, this Court has the authority and discretion to consider any theory related to an issue that was raised below, and will do so whenever the question is important enough. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556 (1941). As the Sixth Circuit recently summarized the matter,

> First, we may deviate from the general rule if this is an exceptional case, if declining to review issues for the first time on appeal would produce a plain miscarriage of justice, or if this appeal presents a "particular circumstance" warranting departure. . . . We also may hear an issue for the first time on

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[1] Please note that there is no doubt at all that the second question presented was fully briefed and argued both in the District Court and the Court of Appeals.

> appeal if doing so would serve an overarching purpose other than simply reaching the correct result in this case. . . . Finally, we should address an issue presented with sufficient clarity and requiring no factual development if doing so would promote the finality of litigation in this case.

In re Morris, 260 F.3d 654, 120-21 (6th Cir. 2001) (citations omitted). As argued below, this case presents particular circumstances that call for review, including not only that consideration of the questions presented serve overarching purposes that go beyond the result in this case (because they have the potential to affect all other States' CON laws) but also that the question is clearly-defined and requires no additional factual development in order for it to be resolved.

Every stage of this litigation has revolved around the issue whether the CNC Act runs afoul of the dormant Commerce Clause doctrine; only the degree of emphasis placed on different arguments has varied. Petitioners have consistently argued that the Commerce Clause is not meant to be used as a mechanism for encroaching upon legislative matters and inquiring into the motive, policy, wisdom or expediency of state legislation. In sum, this Court can and should decide whether a federal circuit court is permitted to engage in dormant Commerce Clause scrutiny and invalidate a state law that was clearly sanctioned by Congress.

Respondents' other argument against the grant of certiorari with respect to the first question presented is to deny that the 1974 Act authorized the States to adopt discriminatory policies in the first place. Respondents' argument is formally valid - if their premise were correct, then the repeal of the 1974 Act would not raise any interesting or important questions of law. Fortunately, the

premise is incorrect, for the 1974 Act did authorize the States to adopt discriminatory laws and regulations.

Respondents concede that the 1974 Act *obliged* each State to establish a CON program (Opp. 3), but fail to recognize what their concession means. In that regard, although it is absolutely true that in order "for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakable clear." *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91 (1984) (Opp. 2, 10, 12, 13), Respondents' reliance on *Wunnicke* is misplaced because it is distinguishable on its facts from this case.

In *Wunnicke*, the State of Alaska argued that its statutory requirement that timber taken from state lands be processed within the State prior to export was insulated from Commerce Clause scrutiny because the policy had been implicitly authorized by a similar federal policy that applied only to timber taken from federal land. This Court explained, however, that the fact that Congress acted only with respect to federal lands was insufficient to indicate that it intended to authorize a similar policy with respect to state lands. *Id.* at 92-93.

In contrast, in the instant case the congressional intent to insulate the CNC Act from Commerce Clause scrutiny is "unmistakably clear." As noted by Respondents, Congress *obliged* each state (as a condition to receiving federal health care funding) to establish CON programs (Opp. 3). Moreover, one only needs to read the definition of "provider of health care" in the CNC Act to corroborate that Congress intended pharmacies to be regulated by state CON programs. *See* 1974 Act § 1531(3)(B)(III).[2] In sum, even if there were

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[2] It is simply wrong for Respondents to claim that the only "purpose for defining 'providers of health care' was to delineate the composition of

something in the CNC Act indicative of discrimination, the fact is that Congress not only allowed it, but also encouraged it, by requiring the States to enact CON programs in order to receive federal funds.

In addition, however, with respect to the first question presented, Petitioners contend that the CNC Act does *not* discriminate against interstate commerce, and that in reaching the opposite conclusion, the First Circuit clearly misapplied Supreme Court precedent, which is another reason for granting the petition for a writ of certiorari in the instant case.

Indeed, it is telling that Respondents do not mention any precedent in support of their theory that the reason why CNC Act is discriminatory is simply because it allows the Commonwealth "to deny a certificate when the new pharmacy will 'unduly affect existing' pharmacies." (Opp. *i*). One of the goals of the 1974 Act was precisely to oversee the adequate market distribution of health facilities and services. In order to achieve this purpose, the 1974 Act provided that "only those services, facilities, and organizations found to be *needed*" would be offered or developed in the States. *See* 1974 Act § 1523(4)(A) (emphasis added). Hence the name "certificate of need." As a result, CON programs nationwide invariably require providers of health care to show the market feasibility of the proposed service in the proposed location.[3]

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the various regulatory councils." (Opp. 11). Although Respondents are free to craft their own theories about the legislative intent behind the 1974 Act, the plain language of the statute shows that Congress meant CON programs to apply to "providers of health care," and that this term includes pharmacies.

[3] Respondents also err in arguing that the fact that the *Asociación de Farmacias de la Comunidad* "has consistently advocated for the inclusion of pharmacies in the CNC Act, despite the considerable

Oddly enough, the best example of the First Circuit's misapplication of Supreme Court precedent (and thus, of the need for Supreme Court review) is to be found in Respondents' own brief, which places much emphasis on the fact that "[t]he First Circuit considered the evidence of the CNC Act's exemption of pre-existing pharmacies in *exactly the same manner* as this Court considered the exemptions in *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978), that is, as weakening the petitioner's argument that the statute was neutral." (Opp. 16, emphasis added). The First Circuit clearly erred by applying the holding in *Raymond* in order to invalidate the CNC Act.

The maze of statutory and administrative exemptions that rendered invalid the statute at issue in *Raymond* are not even remotely similar to the single exemption of the CNC Act that is being challenged here: the grandfather clause. As noted by this Court, the number and type of exemptions in *Raymond* undermined the statute's alleged safety purpose because they routinely resulted in the grant of permits to vehicles that were undistinguishable from those of plaintiffs'

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administrative burdens that the act imposes on its members" is, in itself, "powerful evidence that the CNC Act is protectionist." (Opp. n.1). To the contrary, these facts do *not* support an inference of discrimination; as Justice O'Connor remarked in a concurring opinion:

> The existence of substantial in-state interests harmed by a regulation is a 'powerful safeguard' against legislative discrimination. The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 404 (1994) (citations omitted).

in terms of size, safety and divisibility of loads. *Id.* at 791. There simply was no way to view these laws and regulations as serving neutral objectives; to the contrary, it was fairly obvious that they sought only to protect in-state interests.

In sharp contrast, the grandfather clause of the CNC Act is neutral and serves a rational and legitimate purpose: mainly to avoid unfair results and the possibility of due process violations to those health facilities that were already established at the time of enactment of the CNC Act. Thus, the grandfather clause of the CNC Act, unlike the numerous exemptions at issue in *Raymond,* is simply *not* indicative of discrimination against interstate commerce.

Finally, it is incorrect for Respondents to state that the purpose of the petition for a writ of certiorari is to review the First Circuit's interpretation of the evidence on record. (Opp. 18). The questions presented for review by Petitioner are questions of law that challenge the First Circuit's misapplication of the dormant Commerce Clause doctrine to the CNC Act.[4]

Finally, Respondents miss the mark in attempting to downplay the national importance of this case. For example, Respondents suggest that CON legislation is consistent with the commerce clause: "the First Circuit plainly did not rule that the principles that underlie CON legislation in general to be in any way inconsistent with the commerce clause." (Opp. at 14). By this, they seek to limit the First Circuit's

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[4] As mentioned by Respondents, the District Court did not decide the instant case on cross motions for summary judgment, but instead "the parties consented to a trial by the district court on a stipulated written record that consisted largely of undisputed statistical evidence concerning the application of the CNC Act and expert testimony." (Opp. 7). Although this statement is procedurally correct, it has no practical effect on the outcome of the case because the questions at issue are of law and not of fact.

decision to its facts, and thus, to make this case less likely to be deemed worthy of review.

The attempt should fail. Petitioner agrees with Respondents that CON laws are valid under the dormant Commerce Clause. Nevertheless, she firmly disagrees with the use to which Respondents put this conclusion because, for purposes of Commerce Clause analysis, and contrary to Respondents' contention, there is no material difference between the CNC Act and other States' CON laws. Thus, if other States' CON laws are valid under the dormant Commerce Clause, then so should the CNC Act, and vice-versa: if the First Circuit was correct in holding that the CNC Act was invalid, then so are the other States' CON laws. Respondents cannot plausibly deny that this is an important issue of law.[5]

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED.

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[5] As this Court is aware, the American Health Planning Association (AHPA), the only national organization representing regional and state agencies engaged in the administration of state CON programs, filed an Amicus Brief in support of the petition for a writ of certiorari. The AHPA is not as sanguine as Respondents about the national impact of the First Circuit's ruling in this case.

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